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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1119

NDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, ndividually and as Director of the Indiana Employment Security ivision; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, Individu- lly and as Members of the Indiana Employment Security Board, ENNETH M. SWAIN, Individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

v.

ESSIE D. BURNEY,

Appellee.

Supreme Court, U.S.
FILED
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Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

ETITION FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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PETITION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 42(3) of this Court, permission is sought to file the attached brief since consent has been refused by the parties.

Petitioners are all employers doing business in Indiana with employees in Indiana for whom they make contributions under the Employment Security Act of the State, the statute involved in this appeal. Indiana Code 1971, 22-4-1-1, et seq.; Burns' Ind. Stat. Ann. 52-1525, et seq. The last two named Petitioners also have hundreds of members who are employers in Indiana and have employees in Indiana for whom such members make contributions under the aforesaid statute. The Petitioners are:

College/University Corporation, of Indianapolis, Indiana, a holding company owning insurance and other companies, employing 320 persons;

Danners, Inc., of Indianapolis, Indiana, operator of retail variety stores in Indiana, employing 1,323 persons;

Indiana Steel & Engineering Corporation, of Bedford, Indiana, manufacturer of overhead cranes, employing 45 persons;

LML Engineering and Manufacturing Corporation, of Columbia City, Indiana, manufacturer of grain drying and moistening equipment and pontoon boats, employing 84 persons;

Stewart-Carey, Inc., of Indianapolis, Indiana, distributor of paint, mirrors, wallpaper and other products, employing 127 persons;

Indiana State Chamber of Commerce, of Indianapolis, Indiana, employing 32 persons and with approximately 5,300 member companies; and

Indiana Manufacturers Association, of Indianapolis, Indiana, employing 13 persons and with approximately 1,700 member companies.

Each of the Petitioners has a favorable experience account under the aforesaid Indiana Employment Security

Act, which has resulted in each of Petitioners paying less than the maximum rate provided for in the Act for employers who do not have such a favorable experience rating. Indiana Code 1971, 22-4-11-2 to 3; Burns' Ind. Stat. Ann. 52-1535a and 52-1535b (Supp. 1972).

Under the decision of the lower court, if an employee is paid benefits in the interim pending a hearing and the hearing results in a decision unfavorable to the employee, the Petitioners' experience accounts would be charged with all such payments and remain so charged until it is finally determined that claimant has received benefits to which he was not entitled, at which time the account is relieved of such overpayment. IC 1971 22-4-13-1; Burns' Ind. Stat. Ann. 52-1537(d) (Supp. 1972). To the extent that such payments are not recovered, the employment security fund of the state could be reduced below the minimum level, thereby requiring an increase in the rate of tax on all employers to restore it. IC 1971 22-4-11-2; Burns' Ind. Stat. Ann. 52-1535a (c) (Supp. 1972). The "Unemployment Insurance Statistics" published monthly by the U.S. Department of Labor Manpower Administration, show that there is a lapse of time, as obviously there must be, between the denial of a claim and a review hearing. Such figures also show that in a substantial percentage of cases where monetary benefits have been initially allowed, there has been a subsequent reversal. In Indiana, recovery from employees of payments erroneously paid over a ten-year period was only 68.69% of the total. **Some Significant Statistics About Unemployment Insurance in Indiana**, March 1972, p. 13. Petitioners and all other employers likewise situated are, therefore, adversely affected by the decision of the lower court in this case in that their experience accounts could be charged with all payments where there has been a review or hearing resulting in reversal, and the inability to recover such erroneous payments causes the tax rate on employers to increase. Such charges to Petitioners and

others with favorable experience ratings could result in a substantial increase in rate of tax from as low as less than one per cent to as high as three and two-tenths per cent. Indiana Code 1971, 22-4-11-3; Burns' Ind. Stat. Ann. 52-1535b (Supp. 1972).

Petitioners, since they stand to be adversely affected financially by any affirmance of the lower court decision, therefore, have an interest separate and distinct from that of the named Appellants in the action who are simply charged with enforcement of the Act. Petitioners desire to present, and do present, in the attached brief the questions of law therein discussed which could affect them adversely financially, and which would concern appellants only as to procedural requirements.

Petitioners, therefore, respectfully request that the Court enter an order permitting the filing of the attached brief of *amici curiae*.

Respectfully submitted

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

The interest of *amici curiae* fully appears in the petition for leave to file this brief. *Amici curiae* and all other employers in Indiana may be adversely affected by the decision of the lower court in the manner stated in the petition for leave to file this brief.

The concern of *amici curiae* is genuine, and increased rates for *amici curiae* and all other employers, if the lower

court decision is not reversed or drastically modified, is possible. The volume of cases handled by the Indiana Employment Security Division is tremendous.[1] A "prior due process hearing," undefined by the court below, if it involves all of the elements contended for by Appellee Burney (Appendix 45), would serve no purpose where, as here, there are no disputed facts. It would slow down administrative procedure, particularly when unemployment is on the rise and expedition of claims is most desirable. It would cause the number of appeals to soar when knowledge becomes current that payments would continue until final determination. It would invite as a counter-measure initial holdings against claimants to avoid the assertion of the failure to make payment "when due" argument. It would add wasteful administrative expense. It would afford no rights to claimants not now available under the rules and regulations, and procedures now in force. It would increase the amount of unrecovered payments with which employers are ultimately required to bear.

Amici curiae submit that neither the Federal Act (42 U.S.C., Sec. 503(a)(1), Appendix B of this brief) nor the Constitution (Amendment XIV) requires any different procedures than are now applied under the Indiana Act.

The **Torres** case is directly in point. **Torres v. New York State Department of Labor, et al.**, 321 F. Supp. 432 (U.S. Dist. Ct. S.D. N.Y. 1971); judgment vacated and remanded by this Court (1971), 402 U.S. 968, 29 L. ed. 2d 133; judgment reinstated 333 F. Supp. 341 (U.S. Dist. Ct. S.D. N.Y. 1971); judgment affirmed ... U.S. ..., 31 L. ed. 2d 228 (1972).

The judgment of the court below should be reversed.

---

[1] The published statistics for Indiana in 1971 show 341,917 new claims, 2,310,657 contacts with claimants, and denial for one reason or another of 49,698 claims.

STATEMENT OF THE CASE

Appellee, Essie D. Burney, filed a motion to intervene as plaintiff in a cause initially filed by a Ronald M. Hiatt. Appendix 15-16. Leave was granted. Appendix 2. Mrs. Burney then filed a complaint as a member of a class under Rule 23, seeking an injunction against suspension of payments to her of benefits under the Indiana Employment Security Act without "a prior due process hearing" and "final determination," restoration "immediately" of benefit payments and a declaration that suspension of payments of unemployment insurance benefits without a prior due process hearing was "unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." Appendix 17-23.

Only the intervening complaint and the judgment (Appendix Jurisdictional Statement A-1–A-11) entered on the intervenor's supplemental motion for summary judgment (Appendix 27-28) are involved in this appeal.

The facts were stipulated. Appendix 29-31.

THE FACTS INVOLVED

The defendants are the Indiana Employment Security Division, members of the Security Board, and the manager of the Fort Wayne branch where the Burney case was processed. Appendix 24-25. Mrs. Burney, a citizen and resident of Indiana, had been employed at the Holiday Inn in Fort Wayne, and her employment was terminated December 27, 1970. Appendix 24-25. She applied on January 7, 1971, for unemployment compensation insurance benefits at the Fort Wayne branch and was declared eligible. Appendix 25. She received her first benefits late

in January, and up to March 20 received ten weekly benefit checks of $40.00 each. Appendix 25. By notice dated March 26 she was advised that her benefits were suspended as of the week ending March 27. Appendix 25. The reason stated in the notice was:

> "Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work." Appendix 32.

The notice also states:

> "During periodic interview of 3-24-71, claimant stated that, due to parental responsibilities, she was available for only first shift work." Appendix 32.

The issue involved, as shown by the notice, was "availability for work as of week ending 3-27-71." Appendix 32.

The court treated Mrs. Burney's Request for Admissions, to which no timely response was filed, as admitted (Appendix Jurisdictional Statement A-7), and on that basis stated that the deputy's conclusion in the notice "was based upon Mrs. Burney's failure to accept employment as a dishwasher from 5:00 p.m. to 2:00 a.m. because of transportation difficulties." Appendix Jurisdictional Statement A-8.

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee affirmed the ruling that Mrs. Burney was ineligible. Mrs. Burney then appealed the referee decision to the Review Board of the Division, which, on December 6, 1971, reversed the referee decision. Jurisdictional Statement p. 4.

The decision of the deputy (Appendix 32) and the appeal referee referred to above were contrary to the decision

in **Hacker v. Review Board of Indiana Employment Security Division,** ... Ind. App. ..., 271 N.E. 2d 191 (1971). The court there held that a claimant who restricted her availability for work to certain hours because of family responsibilities had not removed herself from the labor market so as to justify cutting off unemployment compensation. **Hacker** was decided June 30, 1971, but was not published in the advance sheets until after the referee's decision. The Board of Review followed **Hacker** which, by the time of its decision, had been published.

So, Mrs. Burney had a hearing and her right to benefits was restored. Her representation of a class and the broad decree and injunction remain although the issue as to Mrs. Burney has long since become moot.

THE DECREE AND INJUNCTION BELOW

The Court ordered, adjudged and decreed three things (Appendix, Jurisdictional Statement, A-10–A-11):

(1) It held that part of the Indiana Act (Burns' Ind. Stat. Ann. Secs. 52-1542a and 52-1542b (Supp. 1972), Appendix A this brief) invalid and inconsistent with Sec. 303(a)(1) of the Social Security Act (42 U.S.C. Sec. 503, Appendix B this brief) which provides that, in the event a hearing is requested, payment of disputed benefits shall not be made until after a final determination. (This section of the Indiana Act was changed by the Indiana General Assembly in 1972, and any questions as to it are now academic. See note to Appendix A of this brief.)

(2) It held the practice of suspending payments without "a prior, due process hearing" inconsistent with Sec. 303(a)(1) of the Social Security Act (42 U.S.C. Sec. 503, Appendix B this brief).

(3) It enjoined suspending benefits of any person who had been determined eligible for unemployment compensation "without a prior due process hearing."

The court denied defendants' motion to amend the decree by substituting "predetermination hearing" for "prior due process hearing." Appendix 34-43. Counsel for Mrs. Burney, in a memorandum opposing the defendants' motion to amend the decree, set forth their interpretation of "prior due process hearing." Appendix 44-47.

ARGUMENT

The court erroneously applied the Social Security Act and imposed vague restrictions not required by statute, decisions or the Constitution of the United States.

Benefit Rights Determined Weekly

The lower court misconstrued the nature of the initial determination and the weekly determinations. The Indiana Act provides:

> "When an individual files an initial claim the division shall promptly make a **determination of his status as an insured worker** . . ." (our emphasis) IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (Supp. 1972) (Appendix A this brief).

As the remaining portions of the section quoted indicate, this is simply a determination of whether the claimant is qualified under the Act, or, in other words, is an "insured worker" and thus entitled to make future claims to weekly benefits, and, if so entitled, the extent of the benefits. The initial determination of coverage is not a determination that anything is due to claimant at all. It simply is a determination that the claimant had prior employment which would qualify him and was not unemployed for reasons which would disqualify him. Appendix A this brief. The Act makes it clear that the entitlement to benefits is a weekly determination. Subsection (d) of the same section quoted in part above reads:

> "(d) **In addition to** the foregoing **determination of insured status** by the division, the **deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims** waiting period credit or **benefit rights**, the

> validity of his claim therefor, . . . or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 [Sec. 52-1542b] hereof." (Our emphasis) Appendix A this brief.

Not until each subsequent weekly determination is made does anything become due to claimant. What then becomes due is one week's payment and no more, since the Act provides that throughout the benefit period the claimant's eligibility shall be determined **"with respect to each week"** for which rights are claimed. The acts of virtually every other state contain similar provisions. Appendix C this brief. The provision for a weekly determination of benefits is consistent with the purpose of all employment security acts which were fostered and brought into being by the Social Security Act.

The legislative history of the Social Security Act is set forth in Appendix D. It is clear from the history that unemployment benefits are conditioned upon continued involuntary unemployment.

The interpretation by the lower court of "when due" in 42 U.S.C. 503(a)(1) (Appendix B this brief) is not consistent with the legislative purpose as indicated by the legislative history set forth in Appendix D, nor with the language of the Act itself.

First—The "when due" provision relates to a finding by the Secretary of Labor that the states' methods of administration are such as "to be reasonably calculated to insure full payment of unemployment compensation when due." There is nothing in the record to show that the Secretary of Labor has made a finding that the methods of administration in Indiana do not comply with 42 U.S.C. Sec. 503 (a)(1). On the contrary, the Indiana method of administration has, from the beginning, had the sanction required under this section.

Second—The provision of the Indiana Act requiring a determination of eligibility "with respect to each week" for which benefits are claimed during the "benefit period" (Appendix A, p. 2 this brief) is consistent with the Federal Act and is essential to the preservation of the integrity of the concept of unemployment compensation in both the Federal and State Acts, which is that only an eligible employee is to be compensated, and only if from week-to-week during the benefit period he remains eligible.

The statute spells out specifically what is required to remain eligible from week-to-week:

> "An unemployed individual shall be eligible to receive benefits **with respect to any week only if**: . . ." (our emphasis).
>
> (1) "He has made a claim for benefits . . ." IC 1971 22-4-14-1; Burns' Ind. Stat. Ann. 52-1538 (Supp. 1972).
>
> (2) "he has registered for work . . ." IC 1971 22-4-14-2; Burns' Ind. Stat. Ann. 52-1538a (Supp. 1972).
>
> (3) "he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . ." IC 1971 22-4-14-3; Burns' Ind. Stat. Ann. 52-1538b (Supp. 1972).

The statute defines certain circumstances as cases of unavailability, including, but not limited to, some of the following: attending a regularly established school, college, university, hospital or training school; in full-time active military service; unemployment is due to pregnancy; failure without good cause to accept suitable employment.[2]

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[2] Cf. **Dandridge v. Williams**, 397 U.S. 471, 486, 25 L. ed. 2d 491, 502 (1970), where this court said that the State had a "legitimate interest in encouraging employment."

The decree of the court below enjoins the suspension of payments to any persons "without **a prior due process hearing**" who "have been determined eligible but subsequently ineligible pursuant to an administrative hearing." Appendix, Jurisdictional Statement, A-11. A person would become ineligible, under the Act, in any week that he goes back to work, is hospitalized, enters the military service, or dies. In all of these cases the sweeping lower court decree would require **a prior** due process hearing even though the fact which creates the ineligibility is obvious and undisputed.

A due process hearing including all of the elements asserted by Mrs. Burney's counsel (Appendix 44-46) makes no sense at all in cases where, as here, there is no dispute as to the facts. The only question was whether the employment offered Mrs. Burney was suitable[3] in light of undisputed facts about the job and Mrs. Burney's situation.

The lower court decree ignores the fact that no payments are due on any determination beyond a one-week period. It also, by requiring a prior hearing, in effect, extends payments beyond the week-to-week basis wherever a hearing cannot be held within a week. A claimant has ten days to appeal to a referee (IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972)), and fifteen days to appeal a referee's decision (IC 1971 22-4-17-3; Burns' Ind. Stat. Ann. 52-1542b). The notice required is five days before a referee or a board of review hearing (IC 1971 22-4-17-6; Burns' Ind. Stat. Ann. 52-1542e). There is thus built-in a minimum of thirty-five days' delay in appeal and notice time to reach the Board of Review, if all goes on schedule. Some such time period is neces-

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[3] The question of whether employment is suitable arises only three out of a thousand cases on the average. **Some Significant Statistics About Unemployment Insurance in Indiana,** March 1972, p. 11.

sary to give both employer and employee an opportunity to prepare and appear to be heard.

A claimant, simply by taking an appeal to a referee and the board of review, in a case where the facts are undisputed and totally without merit, gains a minimum of six weeks of payments. How significant the time element is becomes apparent in light of a statistic. The Indiana experience shows that the duration of unemployment on the average in the last ten years for each spell of unemployment has varied from a low of 3.9 weeks in 1969 to a high of 5.7 weeks in 1971. In the other eight years the average duration of unemployment was less than 5 weeks. So, return to employment terminates the vast majority of cases where claims are filed. **Some Significant Statistics About Unemployment Insurance in Indiana**, March 1972, p. 7. The notice and appeals period of 6 weeks thus exceeds the average unemployment period. If the lower court decision should stand, appeals would unquestionably increase the actual payment period. Coupled with the statistics on recovery of overpayments shown in the same volume (p. 13), which is only 68.69% in the last ten years, it becomes apparent that the lower court's decision opens the way to wholesale abuse of the appeal process with the possibility of substantial additional cost resulting to employers from rate increases resulting from unrecovered overpayments. Pending an appeal, the incentive for the claimant to actively seek employment would also be reduced.

The decree below effectively writes out of the Act the provisions that the determination of the right to benefits is for one week only.

Hearing Required by Federal Act Is Provided

The Federal Act does provide for a hearing:

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for

unemployment compensation are denied; . . ." 42 U.S.C. Sec. 503 (a)(3); Appendix B this brief.

The court below has read into the Federal Act the word "prior" which is not there and has substituted the nebulous undefined words "due process" for the word "fair." The Indiana Act does provide for the fair hearing required by the Federal Act.

The volume of claims is such that procedures are established in the Claims Manual for placing claimants into three groups for review of weekly benefits on the basis of whether their claims show (1) a firm attachment to the labor market, (2) no firm attachment to the labor market, and (3) need for clarification. The interview procedure and review periods are geared to what experience has shown to be the need for and time of review with a selective interview in each category. Claims Manual, Secs. 13720-13732. Apart from the mechanics for handling volume, the law and regulations do provide for protection of a claimant's rights and a fair hearing.

The Indiana Act requires a "prompt" determination of status upon filing of an initial claim, with written notice to the claimant of the determination of status. The claimant may ask for a hearing before a referee. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (Supp. 1972). Throughout the benefit period "with respect to each week" for which benefits are claimed, a determination is made as to benefit rights. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (d) (Supp. 1972). In cases of disqualification notice to claimant is required and hearing before a referee may be had by claimant. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972). Any person participating in a hearing must be disinterested. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (f) (Supp. 1972). The decision of a referee may be appealed to the

Review Board. IC 1971 22-4-17-3, 22-4-17-5; Burns' Ind. Stat. Ann. 52-1542b, 52-1542d (Supp. 1972).

Regulations adopted pursuant to the Act provide as to the hearing before the referee:

> "All hearings shall be conducted informally in order to determine the substantial rights of the parties. The parties may present such evidence as the referee deems necessary for determining the substantial rights of the parties. The parties to the appeal may appear in person, by attorney, or duly authorized agent or representative, and shall have the right to examine their own witnesses, present evidence and cross-examine witnesses of the opposing party." Burns' Ind. Administrative Rules and Regulations, 52-1542b-1.

Other provisions of the same section are designed to assure informality and fairness, and representation of a party.

The same kind of regulations pertain to the Review Board hearing, including the right to have counsel and have an agent or representative of a labor organization to appear for claimant. Burns' Ind. Administrative Rules and Regulations, 52-1542e-4 and 5.

A Claims Manual issued by the Indiana Employment Security Division specifies in great detail all the matters relating to the rights of a claimant of which he must be informed at the first interview on a claim. Claims interviewers are abjured:

> "**Reason for the interview.** A statement of the purpose of the interview and an explanation of the claimant's rights and responsibilities under the law should be made. The importance of the claimant understanding everything that is expected of him while he is in claimant status should be stressed. He should be en-

couraged to ask questions on any point which is not clear." Unemployment Compensation Claims Manual, Sec. 13712.

The entire thrust of the manual is to assure fair handling and fair hearing with the fullest assistance to claimants in making claims or appeals.

In the initial **Torres** case (321 F. Supp. 432), the court reviewed the procedures required under New York law. An initial "Determination of Entitlement" is made in New York which corresponds to the determination of status in Indiana and there is a subsequent determination of the right to weekly payments. A hearing is provided for in New York following any week claimant was declared ineligible. These procedures were held adequate to "comport with minimum standards of due process." (pp. 437-8) The court also found no violation of 42 U.S.C. 503 (a) (1) (p. 438).

The New York Act, in its basic aspects, is similar to the Indiana Act. The finding of the Secretary of Labor referred to in **Torres** is fully applicable to the Indiana Act before the Court in this case. (p. 438) The record does not show that the Secretary of Labor has taken any different position as to Indiana.

The Indiana Act provides for the kind of hearing required by the Federal Act. The lower court was in error in requiring any different hearing than that now provided for by the statute and the regulations under it.

Java Is Not Controlling

In **California Department of Human Resources v. Java**, 402 U.S. 121, 28 L. ed. 2d 666 (1971), the claimant had been initially determined to be eligible for unemployment compensation and had received payment of some benefits. Upon a belated protest by the claimant's former employer,

the payments to the claimant were automatically terminated until an evidentiary hearing could be held to determine the validity of the employer's protest. Although the district court found this procedure violative of the due process clause and the Social Security Act, the Supreme Court abstained from determining the constitutional issue and decided only the statutory question. This Court held that denying benefits to otherwise eligible claimants automatically upon an employer's protest under the circumstances contravened the mandate of 42 U.S.C. 503 (a) (1). Appendix B this brief. The key to the Court's decision is found in the following quotation from Chief Justice Burger's opinion:

> "It would frustrate one of the Act's basic purposes —providing a 'substitute' for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a defense to the claim by way of appeal. If the employer fails to present any evidence, he has in effect defaulted, and neither he nor the State can with justification complain if, on a prima facie showing, benefits are allowed." 402 U.S. 134.

The issue in the instant case is significantly different from the issue in **Java.** It involves no belated employer's protest and no automatic suspension of payments at the time found to be due.[4] It involves a case where the finding is that payments are not due. The finding of "not due" was predicated upon the employee's own act. Though the questions as to the effect of Mrs. Burney's act were erroneously decided and the issue now mooted as to her, the question

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[4] The Indiana Act was amended in 1972 to provide for continuance of payments in the event of an appeal by the employer or the division. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972), Appendix A this brief, see note at end.

stated is the one remaining on behalf of the class she purports to represent. The question really is the one decided in **Torres v. New York State Department of Labor**, 321 F. Supp. 432 (S.D.N.Y. 1971); vacated 402 U.S. 968, 29 L. ed 2d 133; reinstated 333 F. Supp. 341; affirmed 31 L. ed. 2d 228 (1972), already discussed above.

In **Torres** there was no automatic termination of benefits. The district court reasoned that in **Torres** the procedures complied with due process. Emphasizing that the same procedures were followed in denying benefits as were followed in initially granting benefits, the court concluded that these procedures were reasonably calculated to insure full payment when due. The claimant was afforded an opportunity to explain and support his claim for benefits before any action was taken, and he was provided with a statutory means of appealing adverse decisions. Finally, the court pointed out that in **Torres** ineligibility was founded upon the basis of new facts admitted by claimant. These new facts rendered claimant ineligible, and, thus, no payment was due. In **Java**, payments due were suspended automatically, without affording the claimant an opportunity even to orally present his position. **Torres** and this case are thus inapposite to **Java** because Indiana procedures are like those of New York.

The Indiana Claims Manual makes it clear that at the first suggestion of a question as to the right to benefits, the claims taker refers the claimant to a deputy for the necessary fact finding. Sec. 13620 provides:

> "The benefit rights interview will have thoroughly acquainted the claimant with the import and content of the statement which he will be required to sign as part of his certification with respect to each week for which he is making a claim. The statement contains all of the elements pertinent to questions of availability and capability. Therefor it is unnecessary to

question the claimant in detail to the same effect with respect to each certification. Consequently, the normal continued claim function will be reduced to:

a. Ascertaining answers to the following questions:

(1) Did you work anywhere last week? If so, what were your earnings?

(2) Did you refuse an offer of work?

b. Exploring any obvious question of the claimant's ability to work.

At any time in the accepting of a claim that a potential issue of eligibility or disqualification arises, the claims taker will refer the claimant to a deputy for the necessary fact finding."

(Our emphasis) Claims Manual, Sec. 13620.

The claimant, if the meeting with the deputy results in a disallowance, has the rights of appeal alluded to in this brief. The Claims Manual requires that in the first interview:

"The claimant must be properly informed of his right to appeal any adverse decision by the Division affecting his benefit rights." Claims Manual, Sec. 13712.

Other factors also distinguish **Java.** The first is the administrative feasibility of holding, on notice, a due process hearing for each claimant with a contested claim each week. Determination must be made weekly to insure payment only to the eligible claimants and to deny payment to the ineligible claimants. Changes in status can and do occur. Imposing the requirement of formal hearings **each week** for each contested claim would be a burden impossible to meet, particularly in case of mass layoffs or major unemployment, and would significantly

undermine the whole unemployment compensation system. It would invite initial holdings of no eligibility in such periods of stress.

The decision in this case would require a hearing before benefits could be suspended even if claimant were rehired, during the benefit period, on his old job at his former rate of pay.

Neither public policy nor the Federal Act requires such a result. The employee, if a determination as to any week is erroneous, is paid in full on final determination.

Due Process of Law Provided

Torres is sufficient answer that the procedures afforded under the Indiana law "comport with minimum standards of due process." **Torres v. New York State Department of Labor, et al.**, 321 F. Supp. 437-438. Those procedures have already been described in this brief, and, in addition to those described, there is the right of appeal to the courts from the decision of the Review Board. IC 1971 22-4-17-12; Burns' Ind. Stat. Ann. 52-1542k. The Court, in **Torres**, of due process said:

> "Claimants participate in an application interview, weekly benefit rights interviews, periodic reinterviews and, as needed, claim adjustment interviews. Information which the agency has received is investigated and brought to the claimant's attention at these interviews. Finally, a full due process hearing is provided, with both administrative and judicial review, and any determination favorable to the claimant results in fully retroactive payments." 321 F. Supp. 438.

The judgment in **Torres** was vacated by this Court and remanded for reconsideration in light of **Java** (402 U.S.

968, 29 L. ed. 2d 133). On remand, the lower court adhered to its prior decision (333 F. Supp. 341) and this Court affirmed that adherence (31 L. ed. 2d 228).

Nothing really needs be added to what was said in **Torres** and the decisions referred to therein.

CONCLUSION

We respectfully submit that this Court should reverse the lower court and hold the Indiana procedure to be in conformity to 42 U.S.C. 503 (a) (1) and (3), and not a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted

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